INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	2
Argument	4
Conclusion	7
Appendix	8

CITATIONS

Cases:

Application of the United States, 246 F. 2d 762	6
DeMasters v. *Arend*, 313 F. 2d 79	5, 6
Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501	5
Foster v. *United States*, 265 F. 2d 183, certiorari denied, 360 U.S. 912	5
Globe Construction Co. v. *Humphrey*, 229 F. 2d 148	5
Lash v. *Nighosian*, 273 F. 2d 185, certiorari denied, 362 U.S. 904	4
McDermott v. *John Baumgarth Co.*, 286 F. 2d 864	5
O'Connor v. *O'Connell*, 253 F. 2d 365	4
Okla. Press Pub. Co. v. *Walling*, 327 U.S. 186	5, 6
United States v. *Morton Salt Co.*, 338 U.S. 632	5
United States v. *United Distillers Products Corp.*, 156 F. 2d 872	4–5

716-342—63

Statutes:

	Page
Internal Revenue Code of 1954:	
Sec. 6501 (26 U.S.C. 1958 ed., Sec. 6501)	9
Sec. 7601 (26 U.S.C. 1958 ed., Sec. 7601)	6, 9
Sec. 7602 (26 U.S.C. 1958 ed., Sec. 7602)	6, 10
Sec. 7604(a)(b) (26 U.S.C. 1958 ed., Sec. 7604(a)(b))	10
Sec. 7605(a)(b) (26 U.S.C. 1958 ed., Sec. 7605(a)(b))	6, 12
Miscellaneous:	
Cooper, *Federal Agency Investigations: Requirements for the Production of Documents*, 60 Mich. L. Rev. 187	6

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 590

BAYARD EDWARD RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 9–14) is reported at 320 F 2d 500.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1963 (Pet. 15). The petition for a writ of certiorari was filed on October 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service must establish probable cause to believe that a taxpayer has been guilty of fraud in order to obtain a court order en-

forcing a good-faith summons directed to the production of books and records pertaining to "closed" tax years.

STATUTES INVOLVED

The statutes involved are printed in the Appendix, *infra*, pp. 9–12.

STATEMENT

On August 21, 1961, Donald Whelan, an Internal Revenue Agent, issued a summons directing petitioner to appear at the Internal Revenue Service office in Maysville, Kentucky, to testify and to produce all books and records pertinent to his taxable income for the years 1942 through 1953 (R. 2a–3a.)[1] Petitioner had filed tax returns for each of those years, and collection of any tax deficiency was barred by the ordinary 3-year statute of limitations, unless the returns were fraudulent. Petitioner appeared in response to the summons, but he refused to submit his books and records for examination unless the agent would first submit to him or to his counsel facts demonstrating reasonable grounds for belief that the tax returns were fraudulent (R. 4a, 12a).

The Internal Revenue Service subsequently instituted the present proceeding by filing a complaint in the District Court for the Eastern District of Kentucky, seeking the court's aid in enforcing compliance with the summons (R. 2a–5a). The complaint stated that the agent had "reasonable grounds * * * for a strong suspicion" that petitioner had fraudulently understated his income for the years 1942–1953, and that

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[1] "R." refers to the appendix to petitioner's brief in the court below.

the requested examination was also needed in order to complete an existing investigation of petitioner's tax liabilities.[2] The complaint asserted that the suspicion of fraud was based on "a net worth estimate of the defendant's assets which has been conducted by Donald Whelan" (R. 3a, 4a).

At a hearing in the district court, the agent testified that he had examined petitioner's records for the years 1954 through 1958; that he had determined tax deficiencies for those years; and that he desired to examine petitioner's books for the 1942–1953 period, both in order to determine petitioner's correct tax liability for those earlier years, and in order to corroborate, by a net worth computation, his determination of deficiencies for the 1954–1958 period (R. 24a, 26a). He testified that the determination as to the possibility of fraud was made by him and by his superiors in the Internal Revenue Service, and was based partly upon his tentative net worth computation, and also upon government documents and third party information (R. 29a, 36a). Petitioner's counsel then inquired whether the agent had with him the "tentative net worth" which he had used. The court sustained the government's objection to this question on the ground that the agents "don't have to prove fraud before they go into it" (R. 33a). The court ordered petitioner to

[2] The existing investigation pertained to the "open" years 1954–1958, for which net worth computations were being made. After the district court's order in this case a settlement was reached with reference to the years 1954–1958 (Pet. 10, note 1). Consequently, the only reason remaining for enforcement of the summons is the possibility of fraud in the earlier "closed" years.

comply with the summons (R. 71a), and the court of appeals affirmed (Pet. 15).

ARGUMENT

Petitioner asserts a single reason why this case is appropriate for review by this Court—*i.e.*, that the decision below conflicts with the rule announced in two cases by the Court of Appeals for the First Circuit. Although this conflict exists—and was expressly recognized by the court of appeals in the present case (Pet. 13)—the overwhelming weight of authority (represented by decisions of the four other circuits which have had occasion to consider the question) supports the result reached below. Moreover, the result is clearly correct and follows from principles regarding administrative summonses which have been established by this Court in analogous circumstances.

1. The rule announced by the First Circuit in *O'Connor* v. *O'Connell*, 253 F. 2d 365, and in *Lash* v. *Nighosian*, 273 F. 2d 185, certiorari denied, 362 U.S. 904, is (253 F. 2d at 370):

> [B]efore the tax authorities are entitled to a district court order enforcing a summons directing a taxpayer to testify as to a closed year they must establish to the district court's satisfaction that a reasonable basis exists for a suspicion of fraud, or put another way, that there is probable cause to believe that the taxpayer was guilty of fraud in a statute barred year.

This doctrine has been rejected by all other courts of appeals which have had occasion to consider the question. See *United States* v. *United Distillers*

Products Corp., 156 F. 2d 872 (C.A. 2); *Foster* v. *United States*, 265 F. 2d 183 (C.A. 2), certiorari denied, 360 U.S. 912; *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 (C.A. 5); *McDermott* v. *John Baumgarth Co.*, 286 F. 2d 864, 867 (C.A. 7); *DeMasters* v. *Arend*, 313 F. 2d 79 (C.A. 9), petition for certiorari dismissed by stipulation, No. 159, this Term.

2. The overwhelming majority view, which was followed in this case, is that a district court's power is limited to determining "whether the investigation is being made in good faith for one of the purposes authorized by the statute or to reliev[ing] against oppressive procedures" (Pet. 12). This limited judicial power is similar to that which, according to decisions of this Court, courts are to exercise over other kinds of administrative summonses. See, *e.g.*, *United States* v. *Morton Salt Co.*, 338 U.S. 632; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501. As this Court noted in *Morton Salt* (338 U.S. at 642–643), the investigatory powers delegated to the agency were "more analogous to [those of] the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." The limits of such investigatory power are that the administrator "shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be 'limited * * * by forecasts of the probable result of the investigation * * *.'" *Okla-*

homa Press Publishing Co. v. *Walling*, 327 U.S. 186, 216.

The Internal Revenue Code grants investigatory powers no less broad than those found in the statutes construed by this Court in the cases just cited. Compare Sections 7601 and 7602 of the Internal Revenue Code of 1954 (see Appendix, *infra*) with the statutory provisions set out in *Oklahoma Press*, 327 U.S. at 199–200, nn. 23 and 24. Consequently, there is no reason why the Internal Revenue Service should be held to a stricter standard than administrative agencies or other officials to whom similar power has been delegated.

3. Section 7605(b) of the Code, which prohibits "unnecessary" examinations of a taxpayer's records, does not sustain the position urged by petitioner. As the Court of Appeals for the Ninth Circuit concluded in *DeMasters* v. *Arend*, 313 F. 2d 79, 87, petition for certiorari dismissed by stipulation, No. 159, this Term, after an analysis of the legislative history of that provision and the case law interpreting it: "* * * Congress was primarily concerned with protecting taxpayers from examinations which were 'unnecessary' in the sense that they followed prior investigations of the same matter which had established that there was no basis for liability." See also *Application of the United States*, 246 F. 2d 762, 765 (C.A. 2); Cooper, *Federal Agency Investigations: Requirements for the Production of Documents*, 60 Mich. L. Rev. 187, 204–205 (1961). A judicial determination of the Service's good faith—which may be based on the testimony and demeanor of the

agent—is certainly adequate to protect taxpayers against this apprehended evil, particularly when, as here, there is no claim that the investigation duplicates an earlier inquiry.

CONCLUSION

Despite the conflict, there is no occasion for further review. The decision below is clearly correct, and is in accord with the decisions of four of the five other circuits which have passed upon the question; and there is no need for uniformity among the circuits on the relatively unimportant question involved. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1963.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

* * * * *

(e) *Exceptions.*—

(1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) *Willful attempt to evade tax.*—In case of a willful attempt in any number to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(26 U.S.C. 1958 ed., Sec. 6501.)

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7601.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1958 ed., Sec. 7602.)

SEC. 7604. [As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87 and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374]. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books,

papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7604.)

SEC. 7605. [As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87 and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374]. TIME AND PLACE OF EXAMINATION.

(a) *Time And Place.*—The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable

under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2) or 6421(f)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) ***Restrictions On Examination Of Taxpayer.***—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 1958 ed., Sec. 7605.)

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